**Anyone Sick of COVID Yet?**

**Emerging Special Education Issues Related to the Pandemic**

**October 28, 2021**

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1. **INTRODUCTION**

This presentation will address court cases related to disabled students' arguments that mask mandates are a reasonable accommodation, responding to parents' demands that staff be vaccinated and masked, the distinction between homebound and homebased

services, and Minnesota’s COVID-19 recovery services law.

1. **MASK REQUIREMENTS**
	1. **Minnesota Case Law**
		1. ***Paulsen, et al. v. Rock Ridge Public Schools*, No. 69-VI-FA-21-23 (Minn. Dist. Ct. Oct. 15, 2021)**
			1. **Facts**. On September 27, 2021, the school board of the Rock Ridge School District adopted a COVID-19 Mitigation Plan. The plan included a mask mandate for all staff, students, and visitors while in school buildings, with an exception for students competing in athletic events. A group of parents sued the school district, alleging the mandate violated their rights and their children’s rights under the Minnesota Constitution. They sought a temporary restraining order to enjoin the district from enforcing the mask mandate while the lawsuit was pending.
			2. **Issue**. Whether requiring individuals to wear masks while in a school building violates their rights such that they would be irreparably harmed if the school district was not enjoined from enforcing the masking requirement until a determination is made on the merits.
			3. **Decision**.
				1. The court determined that the issuance of a temporary restraining order was not warranted under the circumstances because the plaintiff could not show that they would suffer any irreparable harm.
				2. The families argued that the school district violated the Education Clause by denying the students access to an education because if students refused to wear a mask, they would not be allowed to attend school. The court disagreed, explaining that the Educational Clause only creates a positive right by requiring the government to do something. The court went on to note that the plaintiffs did not argue that the education the students were provided was inadequate. Instead, the plaintiff argued the Education Clause, in essence, prohibited the school district from taking certain action. The court declined to extend the law in that manner.
				3. The families also argued that the school district violated their rights under the Due Process Clause by failing to follow its policy regarding the adoption of new policies and by prohibiting the students from refusing a medical treatment. The court concluded that the COVID-19 Mitigation Plan was not a formal board policy that needed to be adopted through the official board procedure. The court also concluded that the requirement to wear a mask is not a medical treatment.
				4. The families similarly argued that the school district also violated the Equal Protection Clause because the parents of students who do not wear masks and thus cannot attend school may be subject to criminal prosecution and because those students were denied the right to an education. The court noted that the plaintiffs had not identified two similarly situated groups who were treated differently, as required for this constitutional violation.
				5. The court declined to dismiss the matter sua sponte. While the court noted that it had “serious concerns” about whether the plaintiffs had a viable legal claim against the school district, it explained that the parties had little time to fully investigate the matter at this point in the litigation.
	2. **Case Law from Other States**
		1. ***S.B. by and through M.B. v. Lee*, ---F.Supp.3d--- 2021 WL 4346232 (E.D. Tenn. Sep. 24, 2021)**
			1. In this case, a class of disabled students in Tennessee brought a class action lawsuit against the Governor of Tennessee and the Knox County Board of Education, asking for an injunction to require the school district to impose a mask mandate. The plaintiffs alleged discrimination in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act, resulting from the board's decision not to renew a face mask mandate and from the governor's executive order allowing parents to opt-out of any face covering requirement. The plaintiffs argued that not having a mask mandate prevented them, as disabled students, from safely attending school in person.
			2. The court agreed and granted the temporary injunction, finding among other things, that the plaintiffs were likely to succeed on their claims. The court reasoned that a mask mandate was a reasonable accommodation that would allow disabled students to access their educational environment in person and thus ordered the school district to enforce a mask mandate.
			3. This decision relates to a temporary injunction – the matter will still need to proceed to see whether the court will issue a permanent injunction (unless the parties agree to settle the case). The surge in Delta cases in Tennessee was happening when this case was decided; the judge heavily relied on testimony from doctors related to the surge and the potential safety issues posed to the class of disabled students.
		2. ***Disability Rights South Carolina v. McMaster*, ---F.Supp.3d--- 2021 WL 4444841 (D. S.C. Sep. 28, 2021)**
			1. On September 28, 2021, a federal district court judge temporarily blocked South Carolina’s statewide ban on school mask mandates.
			2. Parents of students with disabilities sued the state saying the ban discriminated against medically vulnerable students by keeping them out of public schools as the COVID-19 pandemic continues.
			3. The judge wrote, “It is noncontroversial that children need to go to school. And, they are entitled to any reasonable accommodation that allows them to do so. No one can reasonably argue that it is an undue burden to wear a mask to accommodate a child with disabilities.” The judge further wrote, “masks must, at a minimum, be an option for school districts to employ to accommodate those with disabilities so they, too, can access a free public education.” The judge wrote that the ruling wasn’t even a close call and that she was following federal anti-discrimination law.
			4. This case addressed a different issue than exists in Minnesota, i.e., South Carolina had a ban on school mask mandates. The judge wrote that districts must have the option to impose a mask mandate. The issue was not whether schools must require masks to be worn in order to accommodate disabled students. This case was appealed to the 4th Circuit Court of Appeals on September 29, 2021. *See also* *ARC of Iowa v. Reynolds*, ---F.Supp.3d--- 2021 WL 4166728 (S.D. Iowa Sep. 13, 2021) (temporarily blocked enforcement of an Iowa statute that banned school districts from mandating masks in schools) (this case is also on appeal).
	3. **OSHA ETS for Health Care Settings.** Over the summer, the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”) issued an Emergency Temporary Standard (“ETS”) applicable to health care settings. Minnesota adopted this federal ETS. This standard has an impact on schools. Among other things, it requires the use of masks by employees in certain areas of schools even if the school itself has not imposed a mask mandate. 29 C.F.R. § 1910.502(f)(1).
		1. **General Scope.** The ETS applies to “all settings where any employee provides healthcare services or healthcare support service.” 29 C.F.R. § 1910.502(a)(1). It does not apply when an employee who is not a licensed healthcare provider provides first aid. 29 C.F.R. § 1910.502(a)(2)(i).
		2. **Health services** mean “services that are provided to individuals by professional healthcare practitioners (e.g., doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health. Healthcare services are delivered through various means including: Hospitalization, long-term care, ambulatory care, home health and hospice care, emergency medical response, and patient transport.” 29 C.F.R. § 1910.502(b).
		3. **Health support services** are “services that facilitate the provision of healthcare services. Healthcare support services include patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services.” 29 C.F.R. § 1910.502(b).
		4. **Limited Application in School Buildings.** Although the ETS applies to schools when an employee provides healthcare services, the scope of the ETS is limited to the healthcare setting and to other locations where a licensed healthcare provider provides healthcare services. This means that the ETS will apply to a health office at a school, but it will be very limited in application to other areas of a school building. Essentially, it will apply outside of a health office only to an employee who is a “licensed healthcare provider” when that person is providing healthcare services in another area of the building.
2. The ETS states “[w]here a healthcare setting is embedded within a non-healthcare setting (e.g., medical clinic in a manufacturing facility, walk-in clinic in a retail setting), this section applies only to the embedded healthcare setting and not to the remainder of the physical location.” 29 C.F.R. § 1910.502(3)(i).
3. According to the *Federal Register*, “an embedded healthcare clinic in a prison, manufacturing facility, or *school* would be treated as a healthcare setting that is separate from the remainder of the prison, manufacturing facility, or school.” 86 Fed. Reg. at 32,563 (emphasis added).
4. The ETS addresses situations where licensed healthcare providers enter a non-healthcare setting to provide services. In these situations, the ETS applies “only to the provision of the healthcare services by that [licensed healthcare provider].” 29 C.F.R. § 1910.502(3)(ii). For instance, “if a nurse provides in-home healthcare while a cleaning person happens to be working separately in the house, the ETS applies to the nurse but would not apply to the cleaning person.” 86 Fed. Reg. at 32,563. Similarly, the ETS would apply to a school nurse providing healthcare in a classroom, but would not apply to a teacher also present in the classroom.
5. The ETS does not define the term “healthcare setting.” *See* 29 C.F.R. § 1910.502(b). However, the *Federal Register* cites to a CDC Guidance Document, which defines “healthcare setting as places where healthcare is delivered.” This includes: “Acute care facilities, long-term acute care facilities, inpatient rehabilitation facilities, nursing homes and assisted living facilities, home healthcare, vehicles where healthcare is delivered (*e.g.,* mobile clinics), and outpatient facilities, such as dialysis centers, physician offices, and others.”
	1. **Exemptions.**
		1. **Disability.** Under the ADA, if an employee cannot wear a mask because of a disability, and the employee requests an accommodation, the District must consider whether it can provide a reasonable accommodation for the employee. 42 U.S.C. § 12111(8).
		2. **Religious Beliefs**. School districts do not need to provide exemptions to accommodate religious beliefs. In *Resurrection School vs. Hertel*, 11 F.4437 (6th Cir. 2021), the Sixth Circuit Court of Appeals held that the Michigan Department of Health and Human Services’ Emergency Order requiring all individuals over the age of five to wear a face covering was neutral and generally applicable, such that any burden on religious practices was incidental.  Because the mask requirement applied equally to secular and religious schools, a Catholic school and the parents of children who attended the school were unlikely to succeed on merits of their free exercise challenge and, therefore, could not obtain injunction eliminating the face-mask requirement for children attending the school.
	2. **Staff Who Work with Immune-Compromised Students.** A school district could require staff to wear masks when serving a special education student who is immune-compromised, even if the school district does not generally require staff to wear masks. Even if a particular employee is resistant to wearing a mask, where the district believes that such a measure is a reasonable safety/health measure given the student’s medical condition, the district has the right as an employer to require the employee to wear a mask and a liability risk may be created if the district does not require employees to wear masks in such situations, particularly were a student to contract COVID-19.
	3. **Potential Student Disciplinary Consequences for Failing to Follow Mask Policy**
6. **Can a District Discipline a Student for Refusal to Comply with a Face Covering Policy?** Possible grounds for disciplinary action under the Pupil Fair Dismissal Act (PFDA):

**a.** willful violation of any reasonable school board regulation. Such regulation must be clear and definite to provide notice to pupils that they must conform their conduct to its requirements;

**b.** willful conduct that significantly disrupts the rights of others to an education, or the ability of school personnel to perform their duties, or school sponsored extracurricular activities; or

**c.** willful conduct that endangers the pupil or other pupils, or surrounding persons, including school district employees, or property of the school.

**2. Can a District Require a Student to Participate in Online School as a Disciplinary Action?** The PFDA defines "dismissal" as the denial of the *current* educational program to any pupil, including exclusion, expulsion, and suspension. Minn. Stat. § 121A.41, subd. 2. Requiring a student to participate in an online program rather than attending their current educational program which is in-person is, in effect, a dismissal. Thus, the PFDA needs to be followed.

1. **VACCINATIONS**
	1. **Employees’ Vaccination Status.**
		1. **Health Insurance Portability and Accountability Act.** HIPAA does not apply to most employers, including most school districts, because they are not “covered entities” that handle and transmit health records. *See* 45 C.F.R. § 160.103. Thus, HIPAA does not prohibit school districts, in their capacity as an employer, from asking their employees whether or not they are vaccinated. The Department of Health and Human Services has stated that the HIPAA Privacy Rule “applies to the disclosures made by your health care provider, not the questions your employer may ask.” *Employers and Health Information in the Workplace*, https://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html.
		2. **Americans with Disabilities Act.** Under the ADA, employers generally cannot make disability-related inquiries of employees. In regards to what kinds of questions count as a “disability-related inquiry,” this is any question (or a series of questions) that is likely to elicit information about a disability. EEOC, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees.
			1. Asking employees whether they have had the COVID-19 vaccine is not a disability-related inquiry in itself under the ADA. The question elicits a “yes” or “no” answer that does not tell the employer anything about the person’s disability status.
			2. In addition, the Equal Employment Opportunity Commission (EEOC) has opined that asking an employee for proof of receipt of vaccine is not a disability-related inquiry. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (Question K.9). Thus, it is permissible to ask employees if they have been vaccinated (or you can request that they present proof of vaccination).
			3. Beware of follow-up questions regarding an employee’s vaccination status. Employers cannot ask employees why he or she did or did not receive the COVID-19 vaccine because that question could potentially elicit information about a disability. Similarly, if an employee fails to present proof of vaccination, employers should not inquire as to why this is the case.
		3. **Vaccine Status is Confidential.** All medical information recorded and obtained from an employee must be kept in a confidential medical file, separate from the employee’s personnel file. *See* 29 C.F.R. § 1630.14. This includes vaccination status; the EEOC has opined that a vaccination record is confidential medical data under the ADA. Vaccination status would also be considered private personnel data under the Minnesota Government Data Practices Act (MGDPA). *See* Minn. Stat. 13.43, subd. 4.
		4. **Parent Requests for Only Vaccinated Staff to Provide Services to their Child.** The IEP team should consider a parent request that only vaccinated staff be assigned to work with their child. The IEP team must consider whether the student has an individualized medical need for such an accommodation. Depending on the facts, assigning vaccinated staff to work with an immune-compromised student or a student who would be at high risk of complications should they contract COVID, agreeing to assign vaccinated staff to work with the student may be appropriate.
	2. **Vaccine Mandates for Employees.** The EEOC has clearly stated that employees entering the workplace can be required to get vaccinated, subject to reasonable accommodations based on a disability, religious belief, or pregnancy.[[1]](#footnote-1) The federal Occupational Health and Safety Administration (“OSHA”) further “suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated.”[[2]](#footnote-2)
2. **Forthcoming Biden Administration Mandate.** On September 9, 2021, the Biden Administration announced that the U.S. Department of Labor’s OSHA is developing a new rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who are unvaccinated to produce a negative test result on at least a weekly basis. This will be implemented through an Emergency Temporary Standard (“ETS”). The exact details of the ETS are not known at this point. Here are some key details being reported at this time:
	1. The ETS is expected to include fines of up to $14,000 per employee for employers that do not comply with the new requirements.
	2. The ETS is expected to apply to public employees, including K-12 educators, in states and territories that have adopted a state-level OSHA approved workplace safety plan. Minnesota is one of these states.
	3. It is unclear when the ETS will be finalized. OSHA has said it will be released in “coming weeks.” The ETS will go into effect when it is published in the *Federal Register*.
	4. The ETS is expected to include exemptions for medical or disability-related reasons and for sincerely held religious beliefs.

An ETS issued by OSHA can remain in effect for up to six months. At that point, OSHA must implement the rules through formal federal rulemaking. OHSA has a mixed history when it comes to successfully issuing an ETS. According to the Congressional Research Service, OSHA has issued ten over the years. Courts have overturned four of them and partially blocked a fifth. The vaccine mandate ETS will undoubtedly face legal challenges.

1. **What is an EUA?** Although one COVID-19 vaccine has attained full FDA approval (Pfizer), and two more will likely soon attain full FDA approval, EUA status is still likely to remain an issue in the foreseeable future as booster shots may tweak the vaccine to effectively fight virus mutations such as the Delta variant. EUAs allow vaccines to be distributed during a public health emergency before obtaining full FDA approval. This allows vaccines to be available months before their full FDA approval.
2. **Federal Food, Drug, and Cosmetic Act (“FDAC”).** As noted above, there has been a lot of misinformation about the legal significance of EUA status in the employment context. This stems from a federal law that allows the FDA to issue EUAs for medical products, including a vaccine, and directs FDA to impose conditions on each EUA product, including informing recipients of the product of “the option to accept or refuse administration of the product.” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). This law simply states that the person receiving the vaccine should be given the option to refuse it *when it is administered*.  Of course, any individual can refuse to take a medical test or procedure from a provider, but this is a separate question from whether an employer can require it (just as employers can require medical exams or drugs tests for certain jobs).  The employee can refuse to take a drug test, medical exam, or vaccine in the sense that nobody is physically forcing them to take it against their will. However, this is an entirely separate issue from an employer’s right to make the vaccine a condition of employment. Courts and the U.S. Department of Justice agree that the FDCA’s “opt out” language does not bar employer vaccine mandates. *See, e.g., Whether Section 564 of the Food, Drug, & Cosm. Act Prohibits Entities from Requiring the Use of A Vaccine Subject to an Emergency Use Authorization*, 2021 WL 3418599 (O.L.C. July 6, 2021); *Bridges v. Houston Methodist Hosp.*, No. CV H-21-1774, 2021 WL 2399994, at \*2 (S.D. Tex. June 12, 2021); *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at \*25 (N.D. Ind. July 18, 2021).
3. **Case Study, *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018).** In another context from the pre-COVID era, the Eighth Circuit Court of Appeals, which has jurisdiction over Minnesota, has upheld an employer vaccine mandate. In the *Hustvet* case, Allina Health System screened employees for certain immunizations it required, which revealed an employee likely did not have a required vaccination. An MMR (Measles, Mumps, Rubella) vaccine was required for all employees with patient/client contact. The employee expressed concern to Allina about the vaccine because of a vague claim that “she had many allergies and chemical sensitivities.” Ultimately, the employee refused to take the vaccine, and Allina terminated her employment. The employee sued Allina alleging discrimination, unlawful inquiry, and retaliation claims under the ADA and the Minnesota Human Rights Act. The Court concluded that the health screen was consistent with the ADA’s requirements because “[t]he information requested and the medical exam, which tested for immunity to infectious diseases, were related to essential, job-related abilities.” This was in part because the goal was to ensure patient and employee safety by reducing the risk of communicable disease exposure and transmission. *Id.* at 408-09. The court also rejected the employee’s disability discrimination claim because of a lack of evidence for any substantial disorder related to “chemical sensitivities.” Finally, the court also rejected her retaliation claim because the evidence clearly showed “she was terminated because of her failure to comply with this legitimate policy, not because she opposed it.”
4. **No Clear Minnesota Authority for K-12 Student COVID-19 Vaccine Mandates at the Local Level.** While vaccine mandates have been upheld at the post-secondary level, there is no clear Minnesota legal authority for schools to impose student COVID-19 vaccine mandates.
	1. **The State Can Mandate.** Minnesota already has a law in place regarding vaccine requirements for K-12 students. *See* Minn. Stat. § 121A.15. The legislature has authority to modify section 121A.15 to make the COVID-19 vaccine mandatory for certain ages or could alternatively amend the statute to grant school districts specific discretion to do so. It is clear that states have the authority to mandate the vaccine. *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (“[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis . . . .”); *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358 (1905) (upholding state mandate for smallpox vaccine).
	2. **Caselaw From Another Era.** In 1902, the Minnesota Supreme Court addressed a dispute over whether the City of St. Paul could require students to get the smallpox vaccine as a condition of their admission to public schools in St. Paul.  The Supreme Court upheld the city’s mandate because there were a number of statutory provisions outlining the ability of a Minnesota city to implement rules and regulations to protect public health.  *See State ex rel. Freeman v. Zimmerman*, 86 Minn. 353, 354, 90 N.W. 783, 783 (1902).  The Court noted that this statutory authority, along with the authority outlined in the St. Paul city charter, gave the city sufficient authority to impose the mandate.  The Court’s opinion mentioned that the St. Paul School Board also enacted a requirement related to the smallpox vaccine.  However, the Court did not address whether this school board requirement was valid due to its conclusion that the city’s mandate was permissible.  Like cities, the authority of Minnesota school districts is limited to the statutory authority conferred upon them by the legislature or what can reasonably be implied from that statutory authority.  *See, e.g., Perry v. Indep. Sch. Dist. No. 696*, 210 N.W.2d 283, 286 (1973).  Given the fact there is already a specific statute outlining what vaccinates are required to attend public school in Minnesota, along with permitted exemptions, a court may conclude that a Minnesota school district cannot unilaterally impose a COVID-19 vaccine mandate as a condition of attending public school.
5. **HOME-BASED AND HOMEBOUND LEARNING AND LRE CONSIDERATIONS**
	1. **MDE Criteria for Homebound Placement**
		1. **Confinement to the Home by a Medical Authority**
			1. A medical authority must provide written verification of the students’ confinement to the students’ home. MDE has defined a “medical authority” as licensed physicians, physician assistants and advanced practice registered nurses who have prescribing authority, i.e., a person licensed to write prescriptions in Minnesota. MDE guidance states that where a student has a medical specialist out of state, a general practitioner locally could write the home confinement letter.
				1. The written prescription must have a termination date or a date by which the situation will be reassessed, to extend no more than a year.
				2. Confinement means that the student is confined to the home in regard to social activities (such as shopping trips, the movies or family vacation).
		2. **Student Isolation/Quarantine Consistent with Public Health Guidance**
			1. A public agency, such as the Centers for Disease Control or the Minnesota Department of Health, has issued recommendations related to student isolation or quarantine due to an epidemic, pandemic or other acts of nature.
	2. **Home-Based Placements**
		1. **IEP Team Can Propose Home-Based Placement**
			1. IEP teams may propose a home-based placement for students who have a medical or educational need for such a placement.
	3. **LRE Considerations**

A home-based placement will rarely be the LRE for a student.

1. What alternatives exist to 1:1 instruction in the home?
2. How can a school district provide social skills instruction to a student who is at home?
3. **COVID RECOVERY SERVICES LAW**

**A. Excerpts from the law**

* + 1. Subd. 2. **Special education services and supports.**
1. A school district or charter school that serves one or more students with disabilities *must invite* the parents of a student with a disability to a meeting of each individualized education program (IEP) team as soon as practicable but no later than December 1, 2021, to determine whether special education services and supports are necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic. The services and supports may include but are not limited to extended school year services, additional IEP services, compensatory services, or other appropriate services.  This meeting may occur in an annual or other regularly scheduled IEP meeting. If the IEP team determines that the services and supports are necessary, the team shall determine what services and supports are appropriate for the student and when and how those services should be provided, in accordance with relevant guidance from the Minnesota Department of Education and the United States Department of Education. The services and supports *must be included in the IEP* of the student. \* \* \*
2. In determining whether a student is eligible for services and supports described in paragraph (a), and what services and supports are appropriate for the student, the IEP team must consider, in conjunction with any other considerations advised by guidance from the Minnesota Department of Education or the United States Department of Education:
	1. services and supports provided to the student before the disruptions to in-person instruction related to the COVID-19 pandemic;
	2. the ability of the student to access services and supports;
	3. the student's progress toward IEP goals, including the goals in the IEP in effect before disruptions to in-person instruction related to the COVID-19 pandemic, and progress in the general education curriculum;
	4. the student's regression or lost skills resulting from disruptions to instruction;
	5. other significant influences on the student's ability to participate in and benefit from instruction related to the COVID-19 pandemic, including family loss, changed family circumstances, other trauma, and illness; and
	6. the types of services and supports that would benefit the student and improve the student's ability to benefit from school, including academic supports, behavioral supports, mental health supports, related services, and other services and supports.
3. When considering how and when the services and supports described in paragraph (a) should be provided, the IEP team must take into account *the timing and delivery method most appropriate for the student*, such as time of day, day of the week, or time of year, and the availability of other services accessible to the student to address learning loss. The IEP team may determine that providers in addition to school district or charter school staff are most appropriate to provide the services and supports described in paragraph (i).
4. A school district or charter school must make available the services and supports included in an IEP, as described in paragraph (i), *until the IEP team determines that services and supports are no longer necessary* to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic.
	1. **Application of the Law**
		1. The MDE has opined that the recovery services law applies to students with IFSPs as well as students with IEPs.
5. The plain language of the law only refers to students with IEPs, not IFSPs.
6. The law does not apply to students with Section 504 plans.

* + 1. The MDE has also opined that districts must reach out to students who have aged out of services or who have graduated to invite them to a meeting to discuss recovery services. The MDE is relying on guidance from the U.S. Department of Education, Office of Special Educational and Rehabilitative Services, that compensatory education services may be awarded to students who have aged out of services and who have graduated. *See Letter to Riffel*, 34 IDELR 292 (OSERS Aug. 22, 2000).
1. The *Letter to Riffel* provides no specific guidance on the application of Minnesota’s COVID-19 recovery services law. The facts upon which that guidance was issued are different than a factual scenario where districts would be reaching out to individuals who are no longer students to discuss recovery services.
2. There is nothing in the *Letter to Riffel* that states that school districts have to proactively reach out to students who are no longer eligible for services to see whether they wish to discuss whether they are owed any compensatory services.

1. The recovery law specifically applies to students with disabilities who receive special education services pursuant to an IEP. Minnesota law includes a specific definition of a “child with a disability,” which is defined as a child who is identified under federal and state special education law as meeting one of the classifications of disability. Minn. Stat. Sec. 125A.02, subd. 1. In Minnesota, a special education student’s eligibility for services ends on July 1 after the student becomes 21 years old. *Id.* § 125A.03(a)(4). A student who is no longer eligible for services because they have aged out of services is not a “child with a disability” for purposes of Minnesota law. Because the individual is no longer a “student,” the law governing recovery services for students with disabilities does not apply.
2. When students aged out of services or graduated in June of 2021, the recovery services law was not in effect as it did not take effect until July 1, 2021. Laws are presumptively prospective and not retroactive. Minn. Stat. § 645.21 (“No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.”); *Sletto v. Wesley Const., Inc.*, 733 N.W.2d 838, 842 (Minn. App. 2007) (“The language of the statute must contain clear evidence of retroactive intent, “such as mention of the word ‘retroactive.’”). Minnesota’s recovery services law does not contain any evidence of a legislative intent to overcome the presumption that laws are prospective. Thus, it cannot apply to students who have aged out of services or graduated before the law became effective.

RASW: 198054

1. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. [↑](#footnote-ref-1)
2. <https://www.osha.gov/coronavirus/safework> [↑](#footnote-ref-2)